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No. 1018

In the Supreme Court of the United States

OCTOBER TERM, 1957

CHANAN DIN KHAN, PETITIONER

v.

BRUCE G. BARBER, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 34-38; Pet. App. viii-xiii) is reported at 253 F. 2d 547. The opinion of the District Court (Pet. App. i-vii) is reported at 147 F. Supp. 771.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1958 (R. 39; Pet. App. xiv). The petition for a writ of certiorari was filed on May 23, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 241(a)(4) of the Immigration and Nationality Act of 1952 authorizes deportation of petitioner as an alien twice convicted of crimes involving moral turpitude, even though the convictions occurred prior to the date of the 1952 Act.

2. Whether convictions at a single trial, on two separate counts, of attempted income tax evasion for consecutive years are, on this record, for two crimes "not arising out of a single scheme of criminal misconduct" under Section 241(a)(4) of the Act.

3. Whether petitioner's convictions for attempted income tax evasion involve "moral turpitude" to make him deportable under Section 241(a)(4) of the Act.

STATUTES INVOLVED

Section 241 of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 204, 208, 8 U.S.C. 1251, provides as follows:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor

and regardless of whether the convictions were in a single trial;

* * * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

* * * * *

26 U.S.C. (1952 Ed.) 145(b), 52 Stat. 513, provides as follows:

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT

Petitioner filed in the United States District Court for the Northern District of California an action to set aside a deportation order and to enjoin the respondent

from executing it (R. 3-6). The court ruled that petitioner was entitled to no relief, and dismissed the complaint (R. 20-21). On appeal (R. 21), the judgment was unanimously affirmed (R. 39; Pet. App. xiv).

The pertinent facts may be summarized as follows:

Petitioner, a native of Afghanistan, entered the United States as a deserting seaman at Baltimore, Maryland, on April 25, 1923 (R. 4, 7, 18). On August 28 or 29, 1949, his status was adjusted and he was granted a Certificate of Registry (special inquiry hearing, June 12, 1956, p. 10; Pet. App. ix).

On January 25, 1952, petitioner was convicted by a jury on an indictment charging him in two counts with violations of 26 U.S.C. 145 (*supra*, p. 3). Count 1 charged that petitioner wilfully and knowingly attempted to defeat and evade his 1946 income taxes by filing a false and fraudulent return and understating his income, and count 2 charged a similar violation regarding his 1947 income taxes (R. 7, 18). Count 1 charged a return of $2,352.80 as against the correct amount of $12,433.42, and count 2 charged a return of $157.15 as against the correct amount of $9,319.16 (Ex. 2, special inquiry hearing). Petitioner was sentenced under count 1 to 18 months' imprisonment, and under count 2 to a $2,500 fine, with five years' probation, to become effective after release from confinement under count 1 (R. 7-8, 18).

On January 4, 1954, petitioner's Certificate of Registry adjusting his status was rescinded (special inquiry hearing, June 12, 1956, p. 10; Pet. App. ix). In later deportation proceedings, a special inquiry officer ordered that petitioner be deported to Afghanistan on the ground that his convictions for income tax evasion

established that he had been twice convicted of crimes involving moral turpitude (R. 3-4). The Board of Immigration Appeals affirmed on August 31, 1956.

The District Court upheld the order of deportation (R. 17-21; Pet. App. i-vii). The Court of Appeals, in its opinion affirming the District Court, held that (1) the convictions under 26 U.S.C. 145(b) did involve moral turpitude, since intent to defraud the government had been charged in the indictment and found by the jury; and (2) that petitioner had been "convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct" to make him deportable under Section 241(a)(4) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251(a)(4) (*supra*, pp. 2-3).

ARGUMENT

1. Petitioner first contends that Section 241(a)(4) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251(a)(4) (*supra*, pp. 2-3), does not make him subject to deportation, since this statute cannot have any retroactive effect so as to cover his two tax evasion convictions which occurred prior to passage of that Act (Pet. 7).

Section 241(a)(4), however, refers to convictions "any time after entry", language broad enough to cover any convictions occurring after entry, even though prior to the 1952 Act. Moreover Section 241(d) (*supra*, p. 3) specifically makes the deportation provisions of that section applicable to all aliens, even though their entry was prior to the Act, or the facts placing them in the classes enumerated in subsection (a) occurred prior to the date of the Act. This Court has recognized the retroactive effect validly intended

by Congress in Section 241(d) of the 1952 Act. *Lehmann* v. *Carson*, 353 U. S. 685; *Mulcahey* v. *Catalanotte*, 353 U. S. 692; *Marcello* v. *Bonds*, 349 U. S. 302, 314.

2. Petitioner also attacks the ruling that his convictions for income tax evasions for the years 1946 and 1947 were for two crimes "not arising out of a single scheme of criminal misconduct" (Pet. 7-8).

The crime denounced by 26 U.S.C. 145(b) (*supra*, p. 3) is complete when the taxpayer wilfully and knowingly files a false and fraudulent return with intent to defeat or evade any part of the tax due. *Myres* v. *United States*, 174 F. 2d 329, 334 (C. A. 8), certiorari denied, 338 U. S. 849; *United States* v. *Croessant*, 178 F. 2d 96, 98 (C. A. 3), certiorari denied, 339 U. S. 927. An attempt to evade income tax for a given year is a separate and distinct offense from an attempt to evade the tax for a different year. *United States* v. *Sullivan*, 98 F. 2d 79, 80 (C.A. 2); *United States* v. *Johnson*, 123 F. 2d 114, 119 (C.A. 7), reversed on other grounds, 319 U. S. 503. Here, the government showed petitioner's tax evasion convictions for two separate years, which necessarily involved different evidence to prove each offense. The fact that the two offenses followed each other closely in point of time and were of a similar character is immaterial, and does not automatically make them part of a "single scheme". Cf. *Matter of D*, Interim Dec. No. 583, April 7, 1954; *Matter of J*, Interim Dec. No. 656, November 23, 1954. Accordingly, from the record in this case, it would appear that petitioner was convicted of two separate and distinct income tax evasion charges, which were not part of a "single scheme of criminal misconduct."

Petitioner argues that it is *possible* for income tax evasion for two consecutive years to be part of a single scheme. Assuming that possibility, however, petitioner can point to no evidence in the record showing that his was such a case. At the hearing before the special inquiry officer on June 12, 1956 (pp. 12-13), petitioner, after consulting counsel, admitted that he had been convicted of income tax evasion for the years 1946 and 1947, but stated in effect that he did not know if this constituted a single scheme, or if he was deportable because of these convictions. For this reason, the special inquiry officer stated that the hearing would have to be adjourned, so that an examining officer could present the government's case. At the resumption of the hearing on June 29, 1956, the examining officer introduced the tax indictment in two counts and the convictions thereunder as Exhibits 2 and 3. Petitioner's counsel, when asked by the hearing officer whether he had anything to present in the way of evidence or otherwise, replied, "We have no evidence to present" (pp. 15, 16, 17, hearing of June 29, 1956). Thus, petitioner did not choose to adduce any evidence regarding the "single scheme" issue. If there had been evidence available to prove a "single scheme," it was peculiarly within petitioner's knowledge, making it incumbent upon him to adduce it as a defense which would remove his case from the terms of the statute; it was not essential that the prosecution prove a negative proposition, *i.e.*, that a single scheme was not involved with respect to these two particular criminal charges for crimes which are frequently separate. Cf. *Rossi* v. *United States*, 289 U. S. 89, 91.

3. There is likewise no merit to petitioner's contention that his convictions under 26 U.S.C. 145(b) do not necessarily involve "moral turpitude," so as to make him deportable under Section 241(a)(4) of the Act (Pet. 8-11).

The wilfulness required under 26 U.S.C. 145(b) means "evil motive" and "bad purpose". *Spies* v. *United States*, 317 U.S. 492, 497-498; *United States* v. *Murdock*, 290 U. S. 389, 394. In order to prove a violation of 26 U.S.C. 145(b), the government must show that the accused had a specific intent to evade taxation, tantamount to an intent to defraud the government. *United States* v. *Rosenblum*, 176 F. 2d 321, 329 (C.A. 7), certiorari denied, 338 U.S. 893; *Bloch* v. *United States*, 221 F. 2d 786, 788 (C.A. 9); *Tsoung Chu* v. *Cornell*, 247 F. 2d 929, 936 (C.A. 9), certiorari denied, 355 U. S. 892.[1]

In the instant case, the indictment charged petitioner with violations of 26 U.S.C. 145(b) for wilfully and knowingly attempting to defeat and evade income taxes by filing false and fraudulent returns understating his income. Fraud was charged and proved as an essential part of the crime. The convictions therefore did involve moral turpitude under the ruling in *Jordan* v. *DeGeorge*, 341 U. S. 223, 227, 232, that crimes in which fraud is proved as an ingredient of the offense are

[1] This Court's decision in the early case of *United States* v. *Scharton*, 285 U S. 518, upon which petitioner relies (Pet. 11), is not a holding that convictions under 26 U.S.C. 145(b) do not involve moral turpitude, so as not to furnish grounds for deportation. *Scharton* held merely that fraud was not in terms denominated an element of the offense for the purposes of the proviso of Section 1110(a) of the Revenue Act of 1926 setting out a six-year statute of limitations as an exception to the general three-year statute.

crimes involving moral turpitude as that term is used in the deportation statutes.[2]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[2] Petitioner's suggestion that Section 241(a)(4) of the 1952 Act and 26 U.S.C. 145(b), when construed together, are void for vagueness, as not affording a sufficiently definite standard for deportation (Pet. 11-12), is without substance. Cf. *Jordan* v. *DeGeorge*, 341 U.S. 223, 229-232. The two lines of decisions—requiring fraudulent intent for a tax evasion violation, and recognizing that crimes in which fraud is an ingredient involve moral turpitude—served as a sufficient warning, along with the specific statutory language of Section 241(a)(4), that petitioner's conduct would result in deportation. The fact that the statute operated retroactively was no bar to deportation. Cf. *Lehmann* v. *Carson*, 353 U.S. 685; *Mulcahey* v. *Catalanotte*, 353 U.S. 692; *Marcello* v. *Bonds*, 349 U.S. 302, 314.